

LAU ZHAN CHEN
(AN INFANT BY HIS MOTHER AND NEXT FRIEND LAU FATT WAN (f))

v.

MAKOTO TOGASE & 2 ORS.

HIGH COURT MALAYA, JOHOR BHARU
DATO HJ. ABDUL MALIK BIN HJ. ISHAK J
[PETITION NO. 33-386 OF 1993]
20 DECEMBER 1994

FAMILY LAW: Section 17(1) Births and Deaths Registration Act 1959 - Petition for declaration of legitimacy and re-registration of birth - Petitioner born out of wedlock - Father's name not included in birth certificate - Whether a blood test should be done to resolve issue of paternity - DNA test confirming paternity - Whether test conclusive - Consideration of ss.5(1) & (4) of the Legitimacy Act 1961 and s.13 of the Births and Deaths Registration Act 1959.

This was a petition for *inter alia* a declaration that the petitioner was the legitimate child of the first and second respondents and for an order that the Registrar-General of Births and Deaths re-register the birth of the petitioner as a legitimated person.

The petitioner, a male infant, was born in Johor Bahru on 9 August 1991 to the second respondent. The birth was registered on 18 August 1991 with the second respondent named as the natural mother. The name of the petitioner's natural father, a Japanese citizen, was omitted as at the material time the first and second respondents were unmarried due to family objection. The couple eventually registered their marriage in Johor Bahru on 28 February 1993 and wished to legitimate their son. In order to provide scientific evidence of paternity, the parties had their blood taken for DNA testing at the Singapore General Hospital which results confirmed that the first respondent was the biological father of the petitioner with a probability of paternity of 99.7%.

The issues were whether the blood test was necessary and whether the test was conclusive as evidence of paternity.

Held:

[1] Where scientific evidence by means of a blood test can resolve the issue of paternity conclusively, the interests of justice require that a blood test should be done in the absence of strong reasons to the contrary.

[2] The authors of an article entitled "The Application of Restriction Fragment Length Polymorphism to Disputed Paternity" published in the Annals by the Academy of Medicine, Singapore has itemised the probable paternity of the three major races in Singapore at 99.97%, 99.97% and 99.96% for the Chinese, Malays and Indians respectively. Though the petitioner's father, in this case, is a Japanese, the Court does not doubt the ability of the scientific officer to conclusively arrive at the probability of paternity at 99.7% for the first respondent as the biological father of the petitioner. In fact she has since signed a statutory declaration to confirm her findings as per her report. Accordingly, the Court grants the petition and orders that the costs be paid by the first respondent to the third respondent.

[Petition granted]

a Case referred to:

Re L [1968] 1 ALL ER 20 (refd)

Legislation referred to:

Legitimacy Act, 1961 (Act 60), ss. 5(1), 5(4)

Births and Deaths Registration Act, 1959, ss. 13, 17(1)

b Other source referred to:

The application of Restriction Fragment Length Polymorphism to Disputed Paternity, S.T. Chow, K.H. Yap, H.E. Tai, the Annals of the Academy of Medicine, Singapore.

For the petitioner, 1st & 2nd respondents - Gan Techiong; M/s. Gan & Lim

For the 3rd respondent - Rosli bin Kamaruddin, FC

JUDGMENT**c****Hj. Abdul Malik bin Hj. Ishak J:**

The petitioner petitioned this Court for the following prayers:

- (a) that a decree be issued to declare that the petitioner Lau Zhan Chen is the legitimate child of Makoto Togase and Lau Fatt Wan (f), the first and second respondents herein;
- d** (b) that the Registrar-General of Births and Deaths, Malaysia re-register the birth of the petitioner as a legitimated person with the name Noriaki Togase and naming Makoto Togase as his natural father;
- (c) costs of this petition be paid by the first and second respondents; and
- (d) such other relief as this Honourable Court may deem fit and proper.
- e** Mr. Gan Techiong, learned Counsel for the petitioner and likewise acting for both the first and second respondents, rightly named the child as the petitioner as s. 5(1) of the Legitimacy Act, 1961 (Act 60) ("the Legitimacy Act") provides that such a petition must be made by the illegitimate person. Equally important and which was done, the petition was delivered to the Attorney General who shall be a respondent at the hearing of the petition (a mandatory requirement under s. 5(4) of the Legitimacy Act).
- f**

In a nutshell, this was a paternity petition. The salient facts are as follows:

The petitioner Lau Zhan Chen, a male infant was born in Johor Bahru, Johor Darul Takzim, Malaysia, at about 12.51 p.m. on 9 August 1991 to Lau Fatt Wan (f) the second respondent herein.

- g** The birth of the petitioner was registered on 18 August 1991, and Lau Fatt Wan (f) was named in his birth certificate as his natural mother. The name and particulars of the petitioner's natural father were omitted in the birth certificate and the following remarks appeared therein: "tidak diperolehi". Though s. 13 of the Births and Deaths Registration Act, 1959 allows the father of an illegitimate child, upon a joint request with the mother of the said illegitimate child, to register and enter his details in the birth certificate, yet this was not done. Why
- h** was this so? We shall soon see in a moment.

As at the date of birth of the petitioner, the petitioner's natural mother Lau Fatt Wan (f) was not lawfully married to the petitioner's natural father. This means, in blunt language, that the petitioner is a bastard.

- i** The petitioner's natural father is Makoto Togase, a Japanese and holding a Japanese passport and, at the material time, was permitted to enter and remain in Malaysia until 12 December 1993 by virtue of a work permit issued by the Malaysian Immigration Department in Johor

Bahru. Makoto Togase is still working in Johor Bahru as a general manager of a factory. It was as the story unfolded, in 1988 that he met Lau Fatt Wan (f) in Johor Bahru, had a whirlwind courtship that lasted for two lingering years. Finally, they decided to marry. But Makoto Togase's parents in Japan objected to the marriage. They both decided to live together as an unmarried couple since 1990. By November 1990 Lau Fatt Wan (f) became pregnant and on 9 August 1991 she gave birth to the petitioner in Johor Bahru. As they were not legally married, they decided that the birth of the petitioner be registered without the name of the natural father.

Elated at the arrival of this bundle of joy, Makoto Togase named his son Noriake Togase and informed his parents in Japan about the latest development and again repeatedly begged for their consent. His parents finally relented and gave their consent and blessings to the marriage between the two love birds. Both parties duly registered their marriage in Johor Bahru on 28 February 1993. Now, they want to render their son legitimate.

In order to provide conclusive scientific evidence that Makoto Togase was indeed the natural father of the petitioner, the parties proceeded to Singapore General Hospital and had their blood taken by Dr. Wee Keng Poh on 5 August 1993 for Deoxyribonucleic acid (DNA) fingerprinting purposes which was later sent to the DNA lab in Singapore for testing. Mrs. Tan Wai Fun, a scientific officer from the Forensic Biology Laboratory of the Institute of Science and Forensic Medicine carried out several DNA tests and, in her report, confirmed that Makoto Togase was the biological father of Lau Zhan Chen, the petitioner. The probability of paternity was stated to be 99.7%. It is germane to reproduce Mrs. Tan's report as follows:

Department of Scientific Services Institute of Science and Forensic Medicine

Outram Road, Singapore 0316, Telephone:2216800,

Telefax: 2290749,

Telex: RS42205 DSSTEL

LAB. NO 93048405

15 September 1993

Report

I, Mrs Tan Wai Fun, Scientific Officer, Singapore do hereby certify that at 3.20 p.m. on 5 August 1993 there were submitted to the Department of Scientific Services by Elliot Lau, 3 specimens of blood sealed "Government of the Republic of Singapore" marked "Lau Fatt Wan", "Lau Zhan Chen" and "Makoto Togase".

Deoxyribonucleic acid (DNA) profiles for genetic loci D2S44, D10S28, D1S7 and D4S139 were developed from Hae III digested high molecular weight DNA extracted from the three blood specimens. The fragment sizes (in basepairs) are as follows:

Marking	D2S44	D10S28	D1S7	D4S139
Lau Fatt Wan	2272 1811	2553 2282	13243 2739	6346 4505
Lau Zhan Chen	4716 2272	2868 2282	2731 2236	9122 6321
Makoto Togase	4716 3170	2876 1245	2248 1419	9074 5646

The results indicate that Makoto Togase is the biological father of Lau Zhan Chen. The probability of paternity is 99.7%.

Sgd.

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Scientific Officer (Forensic Biology Laboratory)

- a* In my judgment, where scientific evidence by means of a blood test, can resolve the issue of paternity conclusively, the interests of justice require that a blood test should be done, in the absence of strong reasons to the contrary.

On blood tests, Lord Denning M.R. had this to say in *Re L* [1968] 1 ALL ER 20 at p. 23:

- b* Blood tests are a modern development. Medical science is able to put the blood of individuals into definite groups; and by examining the blood of a given man and a child, the medical men can tell whether the man could or could not be the father of the child. They cannot say positively of any man that he is the father; but they can say positively that a given man cannot be the father, because the blood groups of him and the child are so different. The science has achieved such a degree of accuracy that, when a man is in truth not the father of a child, and desires to prove it, there is at least a seventy per cent chance, if blood tests are taken, that the doctors can prove positively that he is not the father. In some cases the chance is even higher. As, for instance, when, as in the present case, we know that one or other of two given men is the father, there is a ninety per cent chance that the doctors can say positively that one of them is not the father, with the irresistible inference that the other man is the father.

- d* The facts in *Re L (supra)* can be stated thus. The husband and wife were married in 1947. Since 1956 the wife had been committing adultery with the party cited, unknown to the husband. In 1958 a child was born to her. In December 1963, the wife petitioned for divorce. In May 1964, the husband filed an answer alleging adultery by the wife with the party cited. Both the petition and the answer contained prayers for the custody of the child. In October 1964, the wife left the husband, taking the child with her. In March 1965, the husband first became aware that he might not be the father of the child. In July 1965, a *decree nisi* was made at the hearing of the case undefended on the husband's answer, and an issue of the paternity of the child was directed. The wife and the party cited then admitted that they had committed adultery since 1956. The adult parties to the issue desired that the child's blood group should be ascertained, and each of the adults was willing to submit to serological examination. The Official Solicitor, as guardian *ad litem* of the child, did not consent to an order for the child's blood group to be taken. On appeal from an order that the child's blood grouping should be ascertained, the order being made under the Court's custodial jurisdiction, it was held that a Judge of the Divorce Division, when exercising his custodial jurisdiction had the same jurisdiction as a Judge of the Chancery Division in wardship proceedings, and so had power to order an infant to be subjected to a blood group test, notwithstanding that the guardian *ad litem* did not consent; in the circumstances of the present case the order for arrangements to be made to take the child's blood test was in the best interests of the child and should stand.

- g* Since *Re L (supra)*, medical science has advanced by leaps and bounds. An abstract of an article written by three authors (S.T. Chow, K.H. Yap, H.E. Tai and W.F. Tan entitled "The Application of Restriction Fragment Length Polymorphism to Disputed Paternity" published in the *Annals* by the Academy of Medicine, Singapore) would bring joy to those who want to file a paternity suit. That abstract reads thus:

- h* The Hae III restriction fragment length polymorphism (RFLP) system with four variable number tandem repeats (VNTR) loci has been used to resolve disputed paternity. The system exhibits an average power of exclusion of 99.96% and a mean probability of paternity of 99.96%. In all the casework examined, three VNTR loci provided a minimum 98.11% of probability of paternity. With four VNTR loci, the minimum probability of paternity was 99.69%. The alleged fathers in these cases were of different races: Chinese, Malay, Indian, Caucasian and Black, suggesting that the RFLP system has also been used to resolve disputed paternity cases involving related alleged fathers and cases of "motherless children". To date,
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we have not observed any mutation or recombination on either the maternal or paternal alleles. These results suggest that the RFLP system with four VNTR loci can decisively resolve the biological relationship in disputed paternity cases.

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The abstract so reproduced appears to be worded in a scientific jargon. But, this is not so. The authors of that article said:

In paternity testing, the Deoxyribonucleic acid (DNA) profiles of mother, child and alleged father are compared. Assuming that maternity is not disputed, the child's maternal allele can be identified. The child's paternal allele is then compared with the alleged father's alleles. If a match is found, the alleged father is included as the biological father of the child, otherwise, the alleged father is excluded from paternity.

b

The authors of the article further itemised the probable paternity of the three major races in Singapore. They said this:

c

The calculated probabilities of paternity are 99.97%, 99.97% & 99.96% for the Chinese, Malays and Indians respectively.

Though the petitioner's father, in this case, is a Japanese, I do not doubt the ability of Mrs. Tan Wai Fun to conclusively arrive at the probability of paternity at 99.7% for Makoto Togase as the biological father of the petitioner. In fact, she has since signed a statutory declaration to confirm her findings as per her report. This was done on 16 November 1994.

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Back home in Malaysia, I am told that the Chemistry Department recently unveiled its RM500,000 facility for forensic analysis using DNA. It is certainly a timely move. In future, Malaysians do not have to rush to Singapore for their DNA tests when they want to re-register the births of their legitimated children under s. 17(1) of the Births and Deaths Registration Act, 1959.

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For the reasons adumbrated above, I granted prayers (a) and (b) and, at the same time as agreed by the parties, ordered that costs of RM500 be paid by the first respondent to the third respondent.

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